FILED
AUG 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-77

In The

Supreme Court of the United States

October Term, 1997

RICHARD BREEDLOVE, *et al.*,

Petitioners,

vs.

EARTHGRAINS BAKING COMPANIES, INC.
d/b/a CAMPBELL TAGGART BAKING COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eighth Circuit erred in determining that the calculation of back pay under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988), should be based on working days rather than calendar days within the statutory sixty-day notification period.

STATEMENT PURSUANT TO RULE 29.6

Respondent Earthgrains Baking Companies, Inc. has no parent corporation and no nonwholly owned subsidiaries.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas granting Respondent Earthgrains Baking Companies, Inc.'s motion to dismiss is reported at 963 F. Supp. 802 (E.D. Ark. 1997), and is reprinted in the appendix to the Petition for Writ of Certiorari at 10a. The judgment of the district court is reprinted in the appendix to the Petition for Writ of Certiorari at 16a. The opinion of the United States Court of Appeals for the Eighth Circuit affirming the district court's judgment is reported at 140 F.3d 797 (8th Cir. 1998), and is reprinted in the appendix to the Petition for Writ of Certiorari at 1a.

STATEMENT OF THE CASE

Petitioners Richard Breedlove and Nadine Tanner ("Petitioners"), on behalf of themselves and similarly situated employees, commenced this action in the United States District Court for the Eastern District of Arkansas against Respondent Earthgrains Baking Companies, Inc. d/b/a Campbell Taggart Baking Company, Inc. ("Earthgrains") on July 17, 1996, pursuant to the Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. §§ 2101-2109 (1988). In their complaint, Petitioners alleged that they were former employees of Earthgrains' Little Rock, Arkansas facility whose positions were terminated beginning in December of 1995.[1] They contended that Earthgrains provided them with WARN Act notice on December 6, 1995 that the Little Rock facility would be closed permanently on February 4, 1996 and alleged that by December 31, 1995, Earthgrains had laid off approximately 100 full-time employees in violation of the WARN Act.

1. Earthgrains' statement of facts assumes *arguendo* that all well-pleaded facts of the Petitioners' complaint are true, as it must for purposes of the review of the appellate court's order affirming the dismissal of the complaint. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

Petitioners' complaint also admitted that "in lieu of a 60 day notification period required by WARN, the defendant paid its affected employees for working days within the required 60 day notification period." (Complaint, ¶ 14, reprinted in appendix to Petition for Writ of Certiorari [hereinafter Pet. App.] at 17a-32a).

On August 31, 1996, Earthgrains filed a motion to dismiss the complaint on the grounds that Petitioners had failed to state a cause of action. Earthgrains contended that because it had, by Petitioners' own admission in the Complaint, paid its former employees back pay for every working day within the notification period, Petitioners were not entitled to any further recovery under the terms of the statute. On February 10, 1997, the district court granted Earthgrains' motion to dismiss, holding that damages under the WARN Act should be calculated by working days within the notice period, rather than calendar days.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's ruling. The Eighth Circuit agreed with the majority of the federal appellate courts which have previously ruled on the issue in concluding that the measure of damages under the statute should be based on the number of days an employee would have worked during the statutory notice period. *Carpenters District Council of New Orleans v. Dillard*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996).[2]

2. Since the Eighth Circuit issued its ruling in this case, the Court of Appeals for the Ninth Circuit has also agreed with the holdings of *Dillard*, *Saxion*, and *Frymire*, ruling that damages under the WARN Act should be calculated by working days in the notice period, rather than calendar days. *Burns v. Stone Forest Industries, Inc.*, __ F.3d __, 14 IER Cases 193, 1998 WL 388497 (9th Cir. July 14, 1998).

The Eighth Circuit held that the damages provision of the statute was "susceptible to more than one reasonable interpretation," and that the legislative history of the WARN Act made clear that Congress intended the statute to provide back pay only for working days in the notice period. (Pet. App. 6a, 7a-8a). The court concluded, "Congress did not intend to provide employees who did not receive notice more compensation than they would have received had notice been given." (Pet. App. 9a).

REASONS FOR DENYING THE WRIT

Petitioners' assertion that there is confusion in the lower courts about the proper measure of damages to be assessed in WARN Act cases is unsupportable, as is their contention that the rules of statutory construction compel reversal of the Eighth Circuit's ruling on an important question of federal law. In fact, five of the six federal appellate courts ruling on this issue have rejected Petitioners' statutory construction arguments. Quite simply, there is nothing about this case which merits review by this Court, either because of disagreement among the circuit courts of appeals or because an important issue of federal law should be resolved by this Court.

I.

THERE IS LITTLE CONFLICT AMONG THE FEDERAL APPELLATE COURTS ON THE ISSUE OF THE CORRECT MEASURE OF WARN ACT DAMAGES.

Petitioners contend that there exists among the federal courts of appeals a conflict regarding the proper measure of damages under the WARN Act and that the conflict "will continue to foster litigation and cause similarly situated workers to be compensated differently." (Petition for Writ of Certiorari

("Petition") at 5). In fact, of the six federal appellate courts which have considered the appropriate measure of damages under the WARN Act, *five*, including the court below, have held that working days rather than calendar days is the correct way to calculate the back pay due workers under the statute. *Burns v. Stone Forest Industries, Inc.*, __ F.3d __, 1998 WL 388497 (9th Cir. July 14, 1998); *Breedlove et al. v. Earthgrains Baking Companies, Inc.*, 140 F.3d 797 (8th Cir. 1998); *Saxion v. Titan-C Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, __ U.S. __, 116 S. Ct. 1588 (1996); *Carpenters District Council of New Orleans v. Dillard*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Only one appellate court — the Third Circuit in *United Steelworkers of America v. North Star Steel Co.* [hereinafter *North Star Steel*], 5 F.3d 39 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), the first court to consider the issue — has adopted the calendar days approach, and it did so without reference to the legislative history of the WARN Act. Its reasoning, and that of the Petitioners in this case, has been specifically rejected by the federal appellate courts which have subsequently ruled on the issue. Thus, the conflict among the federal appellate courts on the issue is, contrary to Petitioners' contentions, minimal.

Moreover, this Court denied certiorari in both *Dillard* and *North Star Steel* and dismissed certiorari in *Frymire*. If certiorari was inappropriate in those cases, when the split in the circuits was more pronounced because fewer courts had ruled on the issue, it is even more inappropriate now, when the conflict among the circuits has been minimized by the consistent holdings of the federal appellate courts. Petitioners' fear that uncertainty about the issue will continue to "foster litigation" is, therefore, unfounded. Since the Third Circuit's decision in *North Star Steel*, the federal courts of appeals have been unanimous in rejecting the calendar days approach.

The minimal differences among the district courts on the issue has largely been resolved by the consistency of the federal appellate courts' opinions since *North Star Steel*. The federal district courts and bankruptcy courts outside the Third Circuit have almost all applied the working days approach to calculation of damages under the WARN Act. *See Local 1239 v. Allsteel, Inc.*, 1998 WL 299820 (N.D. Ill. June 2, 1998); *Association of Western Pulp and Paper Workers v. Grays Harbor Paper Co.*, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. March 14, 1994); *Breedlove v. Earthgrains Baking Companies, Inc.*, 963 F. Supp. 802 (E.D. Ark. 1997); *Washington v. Aircap Industries, Inc.*, 860 F. Supp. 307 (D.S.C. 1994); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1296 (E.D. Tenn. 1990), *amended in part*, 748 F. Supp. 1276 (E.D. Tenn. 1990); *In re Hanlin Group, Inc.*, 176 B.R. 329 (Bankr. D.N.J. 1995); *In re Riker Industries, Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993). The only exception outside the Third Circuit which has not been overruled by the appellate courts is the district of Massachusetts, which applied a calendar days approach. *Sinischalchi v. Shop-Rite Supermarkets, Inc.*, 903 F. Supp. 182 (D. Mass. 1995); *United Electrical, Radio and Machine Workers of America v. Maxim, Inc.*, 115 Lab. Cas. ¶ 10,077, 5 IER Cases 629, 1990 WL 66578 (D. Mass. 1990).[3] Because of the consistency of the federal courts since the *North Star Steel* decision, Petitioners' contention that the lower courts are confused about the issue is meritless.

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3. Of the other lower cases cited in the Petition as utilizing the calendar days method, *Joshlin v. Gannett River States Pub. Corp.*, 840 F. Supp. 660 (E.D. Ark. 1993), has been overruled by the Eighth Circuit's decision in this case; *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F. Supp. 326, 331 (C.D. Cal. 1993) has been overruled by the Ninth Circuit's decision in *Burns*; and the other cases — *Kalwaytis v. Preferred Meal Systems*, 78 F.3d 117 (3d Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 73 (1996), and *Georgia-Pacific v. Unemployment Board*, 630 A.2d 948 (Pa. Commonwealth Ct. 1993) — are in the Third Circuit. (*See* Petition at 7).

Thus, the granting of certiorari in this case would not, as Petitioners contend, eliminate unnecessary litigation and avoid undue hardships. (Petition at 7). The issue of the correct calculation of WARN Act damages has been thoroughly litigated in the lower courts and there simply is little conflict among the lower courts on the issue.

II.

THE EIGHTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE PURPOSE, PROVISIONS, AND LEGISLATIVE INTENT OF THE WARN ACT.

Petitioners assert that the Eighth Circuit's decision merits review by this Court because, they contend, it ignores the language, purpose and statutory scheme of the WARN Act. Contrary to Petitioners' assertions, however, the Eighth Circuit's decision reflects a better understanding of the language, goals and legislative history of the statute than does Petitioners' argument. The court of appeals did not err in reaching the conclusion that Congress intended to limit WARN Act damages to workers to back pay they would have received had they continued to work during the notice period. Its holding is entirely consistent with the statute's language and with congressional intent. No review of the Eighth Circuit's decision is, therefore, necessary.

The WARN Act is designed to provide employees with sixty days warning of plant closings and mass layoffs. 29 U.S.C. § 2102(a); 20 C.F.R. § 639.1(a); 134 Cong. Rec. 15,923 (June 24, 1988). A covered employer must notify all employees or their union, as well as the local government, in writing, of its intention to close a plant or engage in a mass layoff sixty days prior to the action. 29 U.S.C. § 2102(a); *see also United Food and Commercial Workers Union Local 751 v. Brown*

Group, Inc., 517 U.S. 544 (1996); *North Star Steel Co. v. Thomas* [hereinafter *Thomas*], 515 U.S. 29, 30 (1995). This advance notice "provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs, and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market." 20 C.F.R. § 639.1(a) (1994); *see also Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994) (WARN Act "intended to provide employees with notice so that they could adjust to the layoff and locate other work"), *cert. denied*, 513 U.S. 1019 (1994); *Halkias v. General Dynamics Corp.*, 955 F. Supp. 695, 697 (N.D. Tex. 1997) (purpose of WARN Act is "to protect workers, their families and communities by providing notice so that workers who will be terminated may seek other jobs or retraining"), *aff'd*, 137 F.3d 333 (5th Cir. 1998).

An employer who violates the notice provisions may be held liable to the unnotified employees in a civil action for "back pay for each day of the violation," to be computed as not less than the higher of "(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or (ii) the final regular rate received by such employee." 29 U.S.C. § 2104(a)(1). The statute also provides that the amount for which an employer is liable should be reduced by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. § 2104(a)(1)(A). Damages may also be reduced by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(1)(B).

Petitioners contend that the purpose of the WARN Act is to "ensure that workers receive timely notice of plant closings" and not to "compensate workers by providing them with

damages in lieu of notice." (Petition at 5). Petitioners argue that the term "back pay" is merely a "label for the method to determine the daily statutory penalty rate" and was intended by Congress to be a penalty to the employer for violation of the WARN Act. (Petition at 6).

Petitioners' interpretation of the term "back pay," however, is contrary to this Court's definition of the term. In *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 197 (1941), this Court held that the term "back pay," as used in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*, means "payment . . . of a sum equal to what [an employee] normally would have earned." Like the WARN Act, the NLRA does not expressly limit back pay available for a violation to actual days the employee would have worked during the violation period. 29 U.S.C. § 160(c). In *Phelps*, however, this Court held that the remedy of "back pay" seeks to restore an employee "as nearly as possible, to that which would have [been] obtained but for the [violation]." *Id.* at 194.

In interpreting the use of the same term in the WARN Act, the federal courts of appeals, even the Third Circuit in *North Star Steel*, have recognized that the term "back pay" under traditional labor law denotes a lost earnings concept. *Dillard*, 15 F.3d at 1283; *North Star Steel*, 5 F.3d at 42-43; *Saxion*, 86 F.3d at 553. For example, the *Dillard* court stated that back pay:

> commonly means pay, i.e., wages, benefits, etc., that an employee would have earned, or to which she would have otherwise been entitled, if the event that affected such job related compensation had not occurred.

15 F.3d at 1283. The court in *Saxion* stated that:

> the term "back pay" connotes a remedy that would require the payment of a sum such that the employees would be put in the same position they would have been had the violation never occurred.

86 F.3d at 553. *See also Washington*, 860 F. Supp. at 310 ("the term 'back pay' commonly means the wages or benefits that the employee would have earned if the violation had not occurred").

This Court has held that in the absence of contrary indication, the courts must assume that when a statute uses a term with a fixed, technical meaning, Congress intended it to have its established interpretation. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991); *see also Morissette v. United States*, 342 U.S. 246 (1952); *Gilbert v. United States*, 370 U.S. 650 (1962). Moreover, Congress is presumed to know the legal background of the area it is legislating. *Downer v. United States*, 97 F.3d 999, 1004 n.3 (8th Cir. 1996).

The Eighth Circuit applied these principles in concluding that the term "back pay" was not merely, as Petitioners argue, a label to identify how damages should be calculated. According to the settled rules of statutory construction set forth by this Court, the Eighth Circuit presumed that when Congress used the term "back pay" in the WARN Act, it was aware of the judicial construction of the term as denoting a lost earnings concept. In fact, the legislative history of the WARN Act supports the presumption that Congress not only knew the meaning of the term "back pay," but that it intended that term to be used as it traditionally had been interpreted under federal labor law. When legislators first introduced two bills mandating advance notice of closings or mass layoff in 1987, critics of the proposed legislation argued that it would adversely affect court decisions relating to the NLRA. Susser, *Election-Year Politics*

and the Enactment of Federal "Plant-Closing" Legislation, 14 Employee Relations L.J. 349, 350 (1988). In later debate concerning the revised proposed legislation — the WARN Act — Senator Metzenbaum, the bill's sponsor, specifically stated that the purpose of the WARN Act was *not* to change existing labor laws or their interpretation:

> This bill has no effect on existing court interpretations of the National Labor Relations Act, nor should it have any effect, whatsoever, on future court decisions relating to the balance of rights under traditional labor law.

134 Cong. Rec. S8598-01 (daily ed. June 27, 1988) (statement of Sen. Metzenbaum).[4] *See also* 134 Cong. Rec. S8614-03 (daily ed. June 27, 1988) (statement of Sen. Metzenbaum) ("I want to say as strongly as I can that we have no intention of affecting the basic labor law.").

Petitioners' dismissal of the term "back pay" as simply a "label," resulting in no ambiguity in the terms of the statute is, consequently, unsupportable. Petitioners have presented no evidence of legislative intent that would counter the presumption that Congress used the term "back pay" to denote the construction courts have traditionally used, because the legislative intent is clearly to the contrary. In addition, Petitioners' argument that the term "back pay" does not connote lost earnings would, in effect, write the term out of the statute without any legislative basis for such a result. *See Dillard*, 15

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4. Senator Metzenbaum made this statement in response to the charge that the WARN Act would upset the balance of union/management rights established by the NLRA and its judicial interpretations by requiring employers to give striking workers sixty days notice of the employers' intention to hire permanent replacements. 134 Cong. Rec. S8589-01 (daily ed. June 27, 1988) (statements of Sens. Hatch, Metzenbaum).

F.3d at 1283-84 n.14; *Saxion*, 86 F.3d at 560. Petitioners thus seek to have this Court in effect nullify a portion of the statute. Such an interpretation is contrary to this Court's admonition in *Estate of Cowert v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) that "courts must give effect to the clear meaning of the statute as written."

Because of the ambiguity created by the use of the term "back pay" in the damages provision of the statute, the Eighth Circuit turned to the legislative history of the WARN Act to determine congressional intent with respect to the issue of damages, just as the courts in *Dillard*, *Saxion* and *Frymire* did. (Pet. App. 6a). And, as did the *Dillard*, *Saxion* and *Frymire* courts, the Eighth Circuit found Congress' intent expressly stated in Senate Report No. 62:

> [F]or violations of the notice provisions, *damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period*, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

S. Rep. No. 62, 100th Cong. 1st Sess. 24 (1987) (emphasis added). The Senate Report sets forth as clearly and concisely as possible Congress' intent with respect to damages available under the WARN Act — those the employee would have received had no violation occurred. It clearly contemplates that the damages provisions are remedial in nature, are tied to the concept of lost earnings and are to be measured in terms of working days rather than calendar days.

The Senate Report, however, is not the only expression of legislative intent with respect to the damage provisions of the statute. The legislative history of the WARN Act is also replete with other references confirming that the working days calculation of damages was the one intended by the legislature. In debating the proposed amendment of Senator Quayle that employers could provide severance pay instead of notice, Senator Metzenbaum, one of the bill's sponsors, stated that, without the Quayle amendment, the bill provided that "if the notice is not given then *there is an obligation to make up the salary.*" 134 Cong. Rec. S8536-01 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum) (emphasis added). Senator Metzenbaum's statement clearly indicates that the purpose of the damages provision of the statute was to "make up" the wages the employee would have received had notice been properly given, that is, to provide the aggrieved employees with wages they would have earned absent a statutory violation. Such a concept is identical to that of lost earnings or back pay. The legislative history also makes clear that the damages provisions were not intended to impose significant financial burdens on employers. In discussing Senator Quayle's proposed amendment to provide for severance pay in lieu of notice, Senator Metzenbaum stated:

> The fact is we do provide that if the notice is not given then there is an obligation to make up the salary, but we do not want anybody to think that this bill is a way of providing additional financial obligations on the part of employers.

134 Cong. Rec. S8536-01 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum). He also stated, "We are not asking to place an additional financial burden on the employers of this country." *Id.* In addition, in discussing the bill, the members of Congress repeatedly referred to the damages available for a

violation of the notice provisions as "back pay." 134 Cong. Rec. H5500-01 (daily ed. July 13, 1988) (statement of Rep. Fawell); 134 Cong. Rec. H5500-01 (daily ed. July 13, 1988) (statement of Rep. Bereuter); 134 Cong. Rec. S8536-01 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum).

In the court below, Petitioners could point to *no* legislative history that supported their interpretation of the damage provision of the statute. As they do in this Court, they simply relied on other ambiguous language in the legislative history which mirrors the ambiguity of the statute. For example, in the Eighth Circuit and in their Petition, Petitioners cite a conference report which states that "for each day of violation, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff. . . ." H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. (1988) at 1052-53. (Petition at 18). Petitioners do not illustrate how this language is any clearer than the language of the statute itself. On the other hand, the Senate Report relied upon by the Eighth Circuit below, as well as the Fifth, Sixth and Tenth Circuits, clearly shows that congressional intent was to limit damages to the traditional concept of back pay — i.e., wages the employee would have earned had he continued to work during the notice period.

Petitioners next argue that the Eighth Circuit's interpretation of the phrase "back pay for each day of the violation" eviscerates the "fundamental goal" of the Act because, under that calculation, "there is no penalty for non-compliance and no incentive to comply" with the notice provisions of the Act. (Petition at 9). Petitioners also contend that the working days interpretation of the damages provision is inconsistent with the fact that damages are meant to be "penalties," relying on dicta in this Court's opinion in *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995).

Petitioners' arguments, however, misconstrue this Court's holding in *Thomas*. In *Thomas*, this Court held that the lower courts should apply state rather than federal statutes of limitations to WARN Act claims. *Id.* Prior to reaching the issue of the appropriate limitations period, the Court discussed the general provisions of the WARN Act. After discussing the notice provisions, the Court stated, "An employer who violates the notice provisions is liable for penalties by way of a civil action. . . ." *Id.* at 31. The clear intent of this Court's statement is that the "penalty" to which it was referring was the "civil action." It did not, contrary to Petitioners' assertions, characterize damages as "penalties"; instead, it characterized "civil actions" as penalties. This Court in *Thomas* did not discuss the issue of damages at all and never characterized the WARN Act as penal in nature.

Moreover, as the district court in *Allsteel* noted, the contention that an employer suffers no adverse consequences for failure to comply with the notice provisions of the WARN Act is "simply wrong." 1998 WL 299820 at *4. As the *Allsteel* court noted, "Employers have an incentive to comply with the WARN Act because they do risk a loss: paying wages to employees but not receiving the benefits of their labor." *Id.* Employers also risk paying civil penalties to local governments for failure to provide adequate notice and payment of attorneys fees and prejudgment interest if a lawsuit is successfully brought by its former employees. 29 U.S.C. § 2104. Thus, contrary to Petitioners' contentions, there is ample incentive for an employer to comply with the statute, even when damages are limited to working days within the notice period.

Petitioners further argue that the goal of the WARN Act — to provide displaced workers with training and readjustment — would be frustrated if they are paid only for the days they would have worked in the notice period. (Petition at 9). Petitioners contend, "The utility of having the plant as a place for workers facing a

common difficulty to congregate and address its solution is what makes advance notice critical," and:

> The concern is that if the workers disperse when they are laid off, few will become involved in worker adjustment programs, whereas two months notice *prior to closing* provides a geographical locus for near-universal participation.

(Petition at 9) (emphasis in original).

Awarding employees damages for each day they would have worked during the notice period, however, does not prohibit employees from receiving a full opportunity to engage in retraining and to seek reemployment. As the court noted in *Allsteel*:

> If employees receive proper notice of a plant closing, they are not entitled to any unearned pay, and have to seek retraining or re-employment on their off-hours. Under the work days approach, the employees are in no way deprived of an opportunity to access training and seek re-employment when proper notice is not given, because they receive compensation for days they would have worked but did not. Indeed, their opportunities are enhanced by having the day-time hours available for job seeking and retraining.

1998 WL 299820 at *5. The Ninth Circuit in *Burns* reached a similar conclusion:

> Another reason why the work days approach makes more sense is that the calendar days construction would put financial pressure on the company to

> reduce expense in a way that would hamper the workers' opportunities to search for new jobs. The company in this and any case could avoid liability by requiring the workers to come in every work day during the 60-day notice period, and tell them to sit and waste time in a plant that produced nothing. But if the company closes the plant and tells the workers to come in for their paychecks and otherwise feel free to look for work, retrain, or do as they like during the 60-day period, then under the workers' theory in this case, it has to pay them for weekends and holidays. . . . Congress was trying to make a shutdown less painful for the workers, yet the construction urged by the workers and the amici in this case would make a shutdown more painful, by discouraging employers from letting workers use the 60-day notice period to search for new jobs.

1998 WL 388497 at *3.

Petitioners also rely on the enforcement provision of the WARN Act as it relates to local governments as proof that the statute's damages provision operates as a penalty to employers. (Petition at 11-12). That provision states:

> Any employer who violates the provisions of section 2102 of this title with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

29 U.S.C. § 2104(a)(4). Petitioners argue that the conference report applies a calculation of the $500-a-day civil penalty for violations of the act for each *calendar* day within the notice period and that damages for aggrieved employees should be calculated in the same way. (Petition at 12). The penalties applied to actions brought by local governments, however, are not available to allegedly aggrieved employees, whose recovery is specifically limited to "back pay for each day of the violation." 29 U.S.C. § 2104(a)(1). The statute provides that "[t]he remedies provided for in this section shall be the exclusive remedies for any violation of this chapter." 29 U.S.C. § 2104(b). With respect to the *civil penalty* provision of the statute, because such a penalty accrues only to a local government, damages cannot be measured in terms of working days within the notice period and thus a calendar day approach is the only one possible. With respect to the "back pay" allegedly due employees, however, the working day calculation is not only possible but was unequivocally the calculation intended by Congress. Thus, the penalty provision with respect to local governments is neither applicable nor relevant to the calculation of back pay under the damages provision available to aggrieved employees.

Petitioners' contentions also ignore the plain language of the Senate Report that, with respect to the *damages* aspects of the statute, the back pay provision was designed to provide the employee with "the wages . . . the employee would have received had the plant remained open or the layoff been deferred until the conclusion of the notice period." S. Rep. No. 62, 100th Cong., 1st Sess. 24 (1987). This was the amount that Congress specifically stated was "designed to penalize the wrongdoing employer" and "deter future violations," and not any other amount in excess of lost earnings, as Petitioners argue.

The congressional intent apparent in the Senate Report utterly refutes Petitioners' argument that the term "back pay" as used in the WARN Act does not connote lost earnings. Indeed, rather than there being clear congressional intent to interpret the term differently than courts have traditionally construed it, the Senate Report and remarks of Senator Metzenbaum demonstrate clear congressional expression that the term back pay as used in the WARN Act is intended to mean exactly what it has always meant in labor law — wages an employee would have earned without a statutory violation. Use of the working days approach rather than the calendar days approach best comports with this congressional desire to award "back pay" because it enables employees to receive the wages and benefits they would have received had the violation not occurred. On the other hand, calculation of damages based on the calendar days within the notice period would be inconsistent with congressional intent because employees would receive more than they would had they continued to work.

III.

THE CALENDAR DAYS APPROACH WOULD LEAD TO INCONSISTENT AND ANOMALOUS RESULTS.

The Eighth Circuit correctly noted that application of Petitioners' interpretation of the damage provision of the WARN Act would lead to anomalous results which are inherently inequitable to the employees the WARN Act was designed to protect. (Pet. App. 7a). *See also Dillard*, 15 F.3d at 1284; *Saxion*, 86 F.3d at 559; *Burns*, __ F.3d __, 1998 WL 388497 at *3. The example set forth by the court in *Dillard* and reiterated by the Eighth Circuit of the absurd result engendered by a calendar days approach was a hypothetical comparing the damages which would be awarded to employees working different hours

during the notice period. 15 F.3d at 1285.[5] Under the calendar days approach to calculation of damages, a full time employee who works ten hours a day, four days a week would be entitled to 600 hours worth of pay (ten hours times sixty days) for a violation of the WARN Act. Another employee who works eight hours a day, five days a week — the same amount per week as the first employee — would only be entitled to 480 hours of pay (eight hours times sixty days) for the same violation. A part time employee who works only ten hours a day, one day a week would also be entitled to 600 hours of pay (ten hours times sixty days), 120 hours **more** than that awarded to the full time employee. *See Dillard*, 15 F.3d at 1285. As the court in *Dillard* noted,

> Under this calendar-day system, not only is the employer severely penalized for choosing to pay damages in lieu of notice, but the full-time employee is treated inequitably, and the part-time employee gets a windfall.

Id.

On the other hand, under the working days calculation method, "such bizarre results do not occur" and damages are fairly allocated. *Dillard*, 15 F.3d at 1285. The full time employee working ten hours a day would receive the same amount as the full time employee working eight hours a day, because the number of days he or she would have worked is included in the calculation. The part time employee, who would have worked only once a week during the sixty-day period would **not** receive more in damages than the full time employee. The

5. This hypothetical situation was first raised in *North Star Steel*, but was rejected by the Third Circuit because the situation was purely hypothetical and because it was unwilling to discuss the method of calculating damages under §§ 2104(a)(1)(A)(i) and (ii). *North Star Steel*, 5 F.3d at 43.

working days calculation is, therefore, as the *Dillard* court stated, "a plain-sense result in a day and time when it is common to find employees with work schedules that vary from the traditional eight-hour day, forty-hour work week." *Id. See also Washington*, 860 F. Supp. at 312 ("If wages are calculated based on a work-day approach, then such inequities would not occur").

Petitioners argue that these inequitable results would not occur under a calendar days approach if courts measure damages based on the calculation of overtime rates under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. (Petition at 16). Petitioners assert that the term "regular rate" as it is used in the WARN Act:

> is derived from the Fair Labor Standards Act . . . , 29 U.S.C. § 207(o)(4), which requires that damages be determined by taking into account "total renumeration for employment," and dividing it by the number of hours a week the employee actually worked.

(Petition at 16). Petitioners, however, offer no authority for the proposition that the term "regular rate" in the WARN Act is derived from the FLSA, nor that the method for calculating overtime rates under the FLSA is the method to be used to calculate back pay under the WARN Act. The definition of "regular rate" is contained in neither the WARN Act nor its regulations and neither the WARN Act nor its regulations contain any reference to calculation of damages under the FLSA overtime rates. *See* 29 U.S.C. §§ 2104(a)(1)(A)(i), (ii); 20 C.F.R. § 639.1 *et seq.*

Moreover, Petitioners' suggestion that the FLSA regulations calculate the "regular rate" as a daily average over

a five-day week is erroneous. The FLSA's regulations specifically state that "[t]he 'regular rate' under the Act is a rate *per hour*." 29 C.F.R. §§ 108, 109 (emphasis added). The hourly rate is calculated by dividing a worker's weekly non-overtime pay by the number of hours the employee worked in that week. 29 C.F.R. § 778.109. As the Ninth Circuit noted in *Burns* when rejecting a similar argument, "Nothing in this definition suggests that the number of hours worked per week should be divided by the number of days in the work week to reach a per-day average." 1998 WL 299820 at *5 n.1.

The language of the WARN Act clearly contemplates calculation by *days* and not by *weeks*: an employer is liable for "back pay for each *day* of the violation. . . ." 29 U.S.C. § 2104(a)(1)(A) (emphasis added). In fact, there is nothing in the statute which demonstrates that the rate should be calculated by the week; the only time period mentioned anywhere in the statute or regulations is a "day." *See Burns*, 1998 WL 299820 at *5. Nor have the courts calculated WARN Act damages with reference to the overtime "regular rate" calculation of the FLSA. *See, e.g., Washington*, 860 F. Supp. at 312 (damages calculated by multiplying hourly rate by eight hours by the number of working days in the notice period without reference to FLSA). In *Dillard*, the Fifth Circuit noted that "the precise method of calculation raises many questions." 15 F.3d at 1285 n.15. It also stated:

> It is clear, however, that those provisions require the calculation of damages based on the daily amount an employee earns, and regardless on how the amount of daily damages is reached, North Star Steel's hypothetical situation illustrates the anomalous results that emanate from the calendar days approach.

Id.

There is absolutely nothing in the WARN Act or its legislative history which would justify the anomalous and inequitable damages awarded under the method of calculation advocated by Petitioners. Even if the statute were designed as a penalty for employers, it was clearly not designed to penalize workers in this way. Nor was is designed to provide some workers with windfalls, while others are treated inequitably. *See Dillard*, 15 F.3d at 1295-96. As the court in *Washington* stated:

> The only reasonable interpretation of the damages provision is that damages should be calculated using the number of work days within the violation period. This interpretation is also the most equitable since it would put the employee back in the same position he or she would have been in had he or she been given notice of the closing.

Petitioners' complaints with the Eighth Circuit's decision amount to nothing more than their disagreement with the fact that the court of appeals did not ignore the plain language of the WARN Act, the judicial interpretation of the term "back pay," the statute's legislative history or common sense. To reach the conclusion advocated by Petitioners in this case, the Eighth Circuit would have violated well-established rules of statutory construction and applied an interpretation which is contrary to congressional intent. The Eighth's holding, like those of the courts in *Dillard*, *Saxion*, *Frymire* and *Burns*, was not incorrect nor did it touch upon an important questions of federal law which should be resolved by this Court. Because there is only minimal conflict among the circuits on this issue, no significant federal question which should be settled by this Court and because the Eighth Circuit's decision did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, certiorari should be denied.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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